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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 168

FREDERICK C. OVERBURY,

Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF SAME.

EDWARD V. CONWELL,
Counsel for Petitioner.

FRANK W. JACKSON,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The petitioner, Frederick C. Overbury, by Edward V. Conwell, Esq., his attorney, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, entered in the above entitled cause on December 16, 1939 (R. 121), affirming a directed judgment by the District Court for the Southern District of New York, after a trial before a jury on April 4 and 5, 1939 (R. 69, f. 206; R. 112).

A rehearing, duly applied for, was denied on January 23, 1940 (R. 120).

Time within which to file the present petition was extended for a period of 60 days from April 23, 1940, by an order of Mr. Justice Stone dated April 18, 1940 (R. 122). The petition was filed June 18, 1940.

Summary and Statement of the Matter Involved.

The action which petitioner respectfully asks this Court to review is for breach of contract (R. 4) and for conversion of petitioner's stock pledged with respondents to secure its performance (R. 8). Petitioner was the plaintiff in the District Court and the appellant in the Circuit Court of Appeals.

The matter involved will be clarified by giving the substance of an earlier transaction between the same original parties, pleaded as a defense at page 15 of the record.

In July, August and September, 1928, petitioner made and delivered a series of collateral notes to Charles L. Denison, amounting in all to $55,500, and secured these notes by pledging 6,000 shares of stock of the Teck-Hughes Gold Mines, Ltd. (Condensed from Ex. E, R. 97-100, and Ex. H, R. 108, fols. 322, 323 [R. 47, 48]).

Two years later, June 30, 1930, petitioner in another and independent transaction made a written agreement with Denison to buy from him 200 shares of Aluminum stock for $48,960 and interest, and pledged 1,574 shares of his Flintkote stock to secure the faithful performance of the agreement (Ex. 1, R. 70; R. 29). The contract says 1,500 shares, but there is no dispute that 1,574 shares were pledged (R. 17, f. 49).

Denison died the same year and both of these transactions came into the hands of respondents as executors and trustees (Ex. E, R. 94, f. 282; R. 47).

As to the 1928 transaction. Respondents transferred the Teck-Hughes notes to William C. Farley on November 2, 1935 (Ex. E, R. 99, fols. 295-6, 100, f. 298; R. 47) and Farley with the knowledge, consent and aid of respondents and their attorneys (R. 57-60, fols. 171-174, 177, 178; 75, f. 225; 100, f. 299), procured an attachment to be levied on November 4, 1935 (Ex. 9, R. 82; R. 60) upon the 1,574 shares of Flintkote stock pledged with respondents (Ex. H, R. 108, fols. 322-3; R. 48). On the same day an action was commenced in New York Supreme Court, Kings County, which resulted in a judgment against petitioner on October 20, 1938 (R. 85). This judgment has since been reversed, as mentioned in more detail below.

As to the Aluminum transaction. Respondents twice modified this agreement as to time of its performance, ultimately making its performance dependent solely on five days notice of readiness to be given by respondents to Overbury (Ex. 2, R. 72; R. 29; Ex. 3, R. 73, f. 219; R. 29; Ex. 4, R. 74; R. 30).

This notice was given on March 2, 1936, with an unconditional demand that petitioner perform on March 19, 1936 (Ex. 4, R. 74, fols. 211, 222; R. 30).

Petitioner duly made full tender of performance (Ex. 5, R. 76; R. 30) which respondents rejected (Ex. 6, R. 77-8, fols. 231, 2; R. 30), assigning as their reason that they "felt themselves bound to respect that attachment" (R. 41, f. 122) which they had procured to be levied on November 4, 1935, more than four months before. This tender and refusal was on March 19, 1936. On March 25, 1936, without further notice, respondents sold 500 shares of Flintkote stock and voluntarily delivered the remaining 1,074 shares to the Sheriff (Ex. D, R. 99; R. 31).

Out of respondents' notice of readiness and demand that petitioner perform his contract, their rejection of peti-

tioner's tender pursuant thereto, and their subsequent disposition of the pledged Flintkote, the action herein arose.

Questions Presented.

I. (A) Whether promissors (respondents here) who have served notice of readiness pursuant to the terms of the contract, and have unconditionally demanded performance by the promisee (petitioner here) have thereby made a binding representation that they are ready, willing and able to perform on their part if the promisee performs on his part?

The Court of Appeals of the State of New York, in *Peck* v. *Collins*, 70 N. Y. 376, 382, has held in the affirmative in these words: "Notice of readiness requires readiness, and implies ability to perform".

The Circuit Court of Appeals has said that "The defendants refused to deliver the Flintkote shares, justifying their refusal because of an attachment levied on November 4, 1935 * * *" (R. 116) and has held that "the lien (of the attachment) was valid at the time of their refusal" (R. 119), and by implication has held here that respondents were not bound to anything by their notice of readiness to perform the contract. Thus the Circuit Court appears to have answered Question A in the negative.

B. Whether the promisee (petitioner) who has duly tendered under the demand, can be put in default if the promissors (respondents) gave their notice untruly and were not in fact ready?

The Court of Appeals in the State of New York, in *Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205, 211, has held—"If he (the promissor) was not in fact ready, neglect to perform on the part of the other party constitutes no default", hence it has answered "no".

The Circuit Court of Appeals has held in this case that "the lien (of the attachment) was valid at the time of their

refusal" (R. 119), and by implication that the sale of petitioner's property after demand and refusal by respondents was valid, and hence it answers "yes".

Thus the decision of the Circuit Court of Appeals is probably in conflict with the decisions in the New York State Courts.

The said decision is also in conflict with the weight of authority in the law of contracts on the general question of demand and refusal.

II. This action was tried on April 4 and 5, 1939, on amended pleadings (R. 4-27, 112). In the meantime, the action in Kings County had terminated in a judgment against petitioner (R. 85-6). Respondents had pleaded this judgment as a special defense to the amended complaint (R. 20, 21, fols. 60, 61) and petitioner pleaded in reply that the judgment had been procured by preventing him from proving at the trial that the notes involved had been paid by the sale of the securities by the firm of which the defendant Emmons was a partner (R. 27). Appeal from this judgment was pending at the time when the Circuit Court of Appeals heard the argument (R. 117). This judgment has since been reversed and a new trial granted (decision New York Appellate Division, 2nd Dept., New York Law Journal of February 19, 1940). The appeal has been reargued, decision upon which is now pending.

Under such conditions, THE QUESTION is—Whether an obligee (petitioner here) in a contract with the obligors (respondents) is compelled to treat a disputed claim of debt arising out of an independent transaction between the same parties, as an established debt, and to pay the same on demand or forfeit his rights under the contract?

The Circuit Court of Appeals has held in substance here that the respondents were free to attach petitioner's stock pledged with them and that the prevention of its delivery

is not to be attributed to their own act, but to the act of petitioner for his failure to pay the amount demanded in the Kings County complaint as an established debt (R. 118-119).

The said decision appears to be in conflict with the rule of law laid down by the New York Court of Appeals in *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100, 101, and with "Restatement of the Law of Contracts" in *Amies* v. *Wesnofske*, 255 N. Y. 156, 163.

III. An attachment and levy having been subsequently vacated and set aside (*Farley* v. *Overbury*, 252 App. Div. (N. Y.) 882, THE QUESTION—whether the persons who procured the attachment to be issued in the name of another party plaintiff and not in their own names, and whether their attorneys, who are paid by them to procure the attachment and represent the plaintiff in the action, are acting in good faith and without knowledge that the attachment and levy under it were invalid, is a matter to be determined by the jury, and not by the court?

It is respectfully submitted that the Circuit Court of Appeals has decided important questions of contract law probably in conflict with decisions in the highest court of the State of New York, and in a way probably untenable or in conflict with the weight of authority, which should be settled by this Court for the common welfare.

Dated New York, June 11, 1940.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

Opinions.

The opinion of the District Court was given orally by Judge William Bondy and will be found in the record at page 67. It does not appear to have been reported. The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Augustus N. Hand and Clark, Judge L. Hand writing) was filed December 18, 1939 (R. 116). It is reported in 108 F. (2d) 155.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925, C. 229 (43 Stat. 938 [28 U. S. C. A. Sec. 346]) and under the proceedings taken herein and set forth in the petition at page 1.

The Facts.

The facts are stated in the petition at page 2. We emphasize the following, repeating record references for convenience of the Court:

1. That respondents procured the attachment in November, 1935 (R. 57-60, 105 f. 314).

2. That they served their notice of readiness to perform the contract and demanded performance by petitioner in March, 1936 (Ex. 4, R. 74, fols. 221-2; R. 30).

3. That performance by petitioner meant payment or due tender of $52,322.59 (Ex. 5, R. 76, f. 228; R. 30).

4. That performance by respondents meant delivery of 200 shares of Aluminum stock which they had agreed to sell for so much, and the surrender of 1,574 shares of Flintkote which they held as pledge (Ex. 1, R. 70, fols. 208-9; R. 29).

5. That petitioner made due tender of performance on March 19, 1936, and demanded the delivery of the 200 shares of Aluminum stock and the surrender of the 1,574 pledged Flintkote stock (Ex. 5, R. 76, 30) which he had a legal right to do. (*Halpin* v. *Phoenix Insurance Co.*, 118 N. Y. 165, 177).

6. That respondents rejected the tender and thereafter and on March 25, 1936, sold 500 shares of the pledged Flintkote and voluntarily delivered the remaining 1,074 shares to the Sheriff (Ex. D, R. 92, 31).

ARGUMENT.

I. Notice of Readiness Implies Ability to Perform.

It is petitioner's claim that when respondents gave notice of readiness and unconditionally demanded that petitioner perform on a day certain, to wit, March 19, 1936, they made a binding representation that if petitioner paid $52,322.59 they would deliver to him 200 shares of Aluminum stock and return to him his pledged 1,574 shares of Flintkote stock.

This appears to be the rule in *Peck* v. *Collins*, 70 N. Y. 376, 382.

Petitioner claims further that when he made tender of the exact amount respondents required of him at the time and place specified in their notice, that act was not in default of his contract, and did not discharge respondents from their duty.

This appears to be sustained in the case of *Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205, 211, and in "Restatement of the Law of Contracts" given in *Amies* v. *Wesnofske*, 255 N. Y. 156, 163.

The Circuit Court of Appeals has held in this case that "the lien (of the attachment) was valid at the time of their refusal" (R. 119) on March 19, 1936, and by inference excused their refusal, notwithstanding respondents' notice that they would perform if petitioner performed, and notwithstanding the legal implication that no obstacle known to them stood in their way, or if there was such they would remove it. Hence this decision is probably in conflict with decisions in the highest court of New York, and with Contract Law on notice and demand, and the vital interest of persons in general and of business people in particular requires these questions to be clarified by this Court.

II. A claim in litigation is not an established debt, and defending a claim is not an act by a party to an independent contract which prevents performance or excuses non-performance of the contract by the other party.

The attachment was the act of the obligors in the Aluminum contract with the obligee (R. 57-60).

Defending the Kings County action on its merits was the act of the obligee.

Time for performance of the contract was fixed by the obligors with knowledge, i.e. that the attachment was in force and that respondents intended not to perform because of it, and that the Kings County action was undetermined (Ex. H, R. 108, fols. 322, 324; 48. Ex. 4, R. 74, fols. 222, 225; 30. R. 41, f. 122. R. 20, f. 60).

Under such conditions, may it be said that defending the action in Kings County was such an act of petitioner as prevented respondents as matter of law from performing their contract?

The Circuit Court of Appeals, however, has held in substance in this case that election by petitioner to defend an action, instead of paying the sum demanded when the action was commenced, amounted to a refusal to pay a separate and established debt, and that "the consequent prevention of delivery (i. e., of the Flintkote stock on March 19, 1936) must be attributed not to him (meaning respondents) but to the buyer" (petitioner) (R. 119).

Petitioner believes on that interpretation of the law of contract, any claim, however groundless, may be treated by the claimant as an established debt, and defending it may be penalized, and that any party who is dissatisfied with a contract may force the other party to pay an improper independent claim or forfeit his rights under the contract.

The decision of the Circuit Court of Appeals in this case appears to mean just that, and it requires no citation of

authority or calls for no argument to satisfy this Court that such a rule of law should be reviewed.

III. A question of good faith is one of fact for the jury and not of law for the court.

The Circuit Court of Appeals has held in substance in this case, after verdict directed by the trial Judge, that respondents acted in good faith in procuring the attachment and in ignorance of its invalidity (R. 118).

The record shows that the attachment in the Kings County action in the name of Farley was procured by respondents and at their expense (R. 57-60). That the same attorneys acted for respondents and for Farley (R. 75, f. 125; 100, f. 299).

That no mention was made of the attachment in respondents' notice of readiness and demand for performance (Ex. 4, R. 74-75; 30).

That under instructions from the attorneys no inventory of the property attached was made or filed (Ex. 9, R. 82; 60).

That the warrant was not filed until three years after it was granted (Ex. F, R. 104, f. 310; 47).

Martin v. *Central Vermont R. R. Co.* (50 Hun. 347, 353). "It is difficult to have justice done where the same attorneys appear for both parties in the litigation, and thus enable both parties to combine to take property from a third person who has not notice of the proceeding."

Petitioner claims the right under the Seventh Amendment of the Constitution and under the decisions (*e. g., Texas & Pacific Railway Company* v. *Cox*, 145 U. S. 593, 606; *McCarthy* v. *New York, N. H. & H. R. Co.*, 240 F. 602, 608 [2nd Circuit]), to have these facts and all inferences that might be drawn from them passed upon by the jury.

Petitioner claims further that the Circuit Court of Appeals erred in not reversing the judgment and allowing

a new trial, since it appears from the court's opinion that if a jury had determined, on any view which could be properly taken of the facts, that respondents or their attorneys had *not* acted in good faith or were *not* ignorant that the writ was irregular, the appeal would have terminated differently.

Conclusion.

The questions which this application suggests should be definitely settled by this Court. The decision of the Circuit Court of Appeals herein is probably both in conflict with decisions in the highest court of the State of New York, and contrary to sound principles of the established law of contracts of this country.

Dated June 11, 1940.

Respectfully submitted,

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PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF.

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PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF.

Opening Statement.

Because of matters dealt with in respondents' brief, it is necessary in this reply to go somewhat outside the scope of argument customary on applications of this kind.

Respondents' Version of the Facts.

Respondents say in their brief (p. 1) that the material facts in this case are clearly set forth in the opinion of the Circuit Court. Obviously through inadvertence, the opinion of that learned court is inaccurate in certain respects. For instance, at page 116 of the record there is omitted from the

opinion the statement that Overbury's tender was under compulsion by respondents' notice of their readiness and their unconditional demand for the performance of the contract by him (R. 74, 75). The materiality of this omission is shown in petitioner's Question No. IA (Pet. p. 4). Respondents have made no attempt to answer this question except to say it is inconsequential (answering brief, pp. 3, 4). Again the court said, top of page 117: "Overbury says, and *arguendo* we shall assume it to be true, that this assignment was only as trustee for the defendants in order that Farley, who lived in New York, might be better able to attach the Flintkote shares". There is no such assertion by Overbury in the record. If there had been, respondents would have referred to it in their brief, instead of relying upon the court's evident error in attributing it to Overbury. As a fact, Overbury said respondents used Farley as a dummy (R. 25, f. 73) and the learned trial judge held he was practically a dummy (R. 59, f. 175). The materiality of giving the real status of Farley is brought out in the minority opinion of the Appellate Division, in which it was said: "The foreign representatives (meaning respondents) who assigned to plaintiff (Farley) in this State for the purpose of bringing this action (in Kings County) did so in violation of their duties as fiduciaries, and the defendant (Overbury) in paying the alleged assignee, would not be protected against a future claim by the assignors". (New York Law Journal, July 2, 1940, p. 11).

Without further analysis, it is sufficient to say that all the material facts in this case have been set out in the petition with appropriate references to the record.

Additional Facts.

The reargument of the appeal in the Kings County action, mentioned at page 5 of the petition herein, resulted in the affirmance of the judgment in favor of Farley by a divided

court. Two of the justices dissented and voted to reverse the judgment and to dismiss the complaint (New York Law Journal, July 2, 1940, *supra*). This gave the defendant, petitioner here, the right to appeal to the New York Court of Appeals, and such appeal has been taken.

Respondents' Citations.

At page 2 of respondents' brief appears an excerpt from 65 C.J. 59 to the effect that it is a good defense to an action in conversion that the property was seized under an attachment against the owner of the property, or that at the time of the demand the fund in question was under order of court in garnishment proceedings. The latter phrase has no application here. In none of the cases cited in C.J. to support the excerpt did it appear that the person seeking to justify his refusal to surrender the property had himself procured or been instrumental in procuring the issue and levy of the attachment, as is the fact in this case (petition herein, top p. 3).

A defendant's participation in or responsibility for the levy of an attachment deprives him of its protection as a defense to an action for conversion of the property (*United States* v. *Peck*, 102 U. S. 64; followed in *Imperator Realty Co.* v. *Tull*, 228 N. Y. 447, 457; *United States* v. *Stephens*, 1 Fed. Supp. 33, 34, and cases there cited.)

Concerning the rule taken from 65 C.J. 69, respondents say in their brief here (bottom p. 2): "A leading New York case applying this principle is *Warner* v. *Jaffray*, 96 N. Y. 248." In that case one Weld made an assignment in New York of property which he owned in Pennsylvania. Under the law of the latter State, an assignment was not valid until it had been recorded and creditors had received notice of it. Before the assignment had been recorded and noticed to creditors the plaintiffs, also residents of New York, levied an attachment on the property in Pennsyl-

vania. The only holdings in the case were (p. 255) that under Pennsylvania law the attachment took precedence over the assignment, and (p. 258) that the plaintiffs stood on a parity with creditors in Pennsylvania in respect of enforcing their claim in the courts of that State.

Respondents' Version of Question IA.

Respondents have undertaken to restate petitioner's first question according to a formula of their own (respondents' brief, p. 4). The proposition as stated by them is fallacious. No lien or claim attached to the collateral between the notice of readiness and the time fixed therein for unconditional performance (R. 74, 75).

As to Question IB.

Respondents' argument on pages 5 and 6 of their brief is beside the point raised in the above question, which is concerned both with their refusal to deliver the pledged collateral when Overbury made tender, and with their sale of the collateral after the tender. Respondents could justify such sale only if petitioner's tender was not good. That it was good is not questioned, and the trial court held it was good (R. 54, fols. 128, 129). The New York Court of Appeals (*Halpin* v. *Phoenix Ins. Co.*, 118 N. Y. 165, 177) laid down the applicable rule in the following language:

> "A debtor who has transferred securities as collateral to the debt, has a legal right upon payment of the debt, to have such collaterals reassigned to him, and a tender of the debt is not destroyed by making a condition of its acceptance that the creditor transfer the collaterals to him, because that condition is one the debtor has the right to insist upon and the creditor has no right to refuse."

Neither respondents nor Farley (their purported assignee) had a lien on the collaterals when Overbury made

his tender under respondents' demand; not Farley because the attachment in the Kings County action was later held void *ab initio* (*Farley* v. *Overbury*, 252 App. Div. 882); not respondents because the instant the tender was made, their lien as pledgees was discharged (*Lawrence* v. *Maxwell*, 53 N. Y. 19, 23). Overbury was never in default, and respondents had no right to refuse to deliver his collateral and then to sell it.

Question II.

Respondents concede (their brief, p. 6) the correctness of the statements in the second question presented, but say they are not relevant to this case. This contention is negatived by the established rule that "a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract" (*Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100).

The Circuit Court of Appeals (middle p. 119) expressed the view that performance of the contract involved here was prevented not by the act of respondents, but by petitioner's refusal to pay an alleged separate debt to respondents (litigated in Farley's name in the Kings County action). One may not adjudicate a disputed claim in his own favor and then convert the property of his alleged debtor as a penalty for non-payment. The "separate debt" had not been finally established when the present cause of action arose, and has not been finally established now. When respondents served their notice of readiness and demand for performance, they did so with knowledge of the attachment procured by them through their purported assignee, and in effect waived the attachment or represented that it would be removed before the date set for performance. "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that

he will himself do nothing which may hinder or obstruct that other in doing that thing" (*Patterson* v. *Meyerhofer*, 204 N. Y. 96, 101, *supra*).

As to Question III.

The judgment appealed from was entered on a verdict directed by the court (R. 69, fol. 206). The learned trial judge in his decision (R. 68, fol. 203) said that there was "no evidence upon which to base a finding that defendants acted in bad faith with respect to the attachment or knowingly resorted to an invalid procedure to force plaintiff to default upon his contract to purchase the Aluminum stock." The evidence established beyond question both the facts which the learned judge said had no support in the evidence; and the respondents in fact concede (e.g. brief, pp. 5, 6) that they knowingly prevented petitioner from performing the Aluminum contract (on which he never had defaulted) in order to enable respondents to pay themselves the "independent claim" by appropriating defendant's collateral pledged under the Aluminum contract. In any case, the questions of respondents' good faith and their prevention of performance by petitioner were for the jury. It was pointed out at the trial that while the facts were not in dispute, different inferences could be drawn from them, and that this must be done by the jury (R. 62, fol. 186). This stated correctly the law of New York on the subject. "When from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being, from the existence of another fact, it is for the jury to go through with that process" (*Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622, 623).

Conclusion.

It is respectfully submitted that the writ should be granted.

Dated: New York, August 1940.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The material facts in this case are clearly set forth by Judge Learned Hand in his opinion at page 116 of the Transcript of Record. An additional fact is that since the filing of petitioner's papers, the Appellate Division of the Supreme Court, Kings County, on July 2nd, 1940, affirmed upon re-argument the judgment in favor of Farley and against the petitioner Overbury in the suit on the notes, subject of the attachment proceeding mentioned in the moving papers.

This brief may facilitate the Court in disposing of the petition for certiorari. In summary, we urge that there were no questions of law in this case decided by the Courts below in conflict with any Federal statute or with decisions

of the Courts of the State of New York or "contrary to sound principles of the established law of contracts of this country".

The opinion of Judge Bondy at pages 67, 68 and 69 of the Transcript of Record and of the Circuit Court of Appeals by Learned Hand, C. J., at pages 116 to 119 of the Record, are simple and lucid, and do not indicate that these Courts imagined that they were deciding questions of law with respect to which there were strong decisions to the contrary; or that there were decisions of Federal or New York State Courts contrary to the law applied by these Courts to this case. What was held by the Courts below may be succinctly stated as follows:

Where there is a contract for the sale and purchase of a chattel and the intended buyer has deposited property belonging to the buyer as collateral security for the buyer's performance of the contract, the seller is not required to deliver the collateral to the buyer upon tender of the purchase price of the chattel if there has been an intervening attachment lien acquired against the interest of the buyer in this collateral. Therefore, the refusal of the seller, because of the existence of such attachment lien, to deliver the collateral is not a breach of the seller's contract.

This holding by the Court is in exact conformity to settled New York State law and Federal law. The rule is thus stated in 65 C. J. at page 69:

> "(§ 112) 4. Other Legal Proceedings. It is a good defense that the property claimed to have been converted was seized under an attachment against the real owner, or, where it is sought to show conversion by proof of a demand and refusal, that at the time of the demand, and up to the time of the commencement of the action, the fund in question was under order of court in garnishment proceedings . . ."

A leading New York case applying this principle is *Warner* v. *Jaffray*, 96 N. Y. 248. Numerous other cases

may be cited to the same effect. No attempt is made by the petitioner to cite either New York or Federal cases to the contrary.

The argument of the petitioner is based upon the assertion as a premise of the following alleged fact:

> "4. That performance by respondents meant delivery of 200 shares of Aluminum stock which they had agreed to sell for so much, and the surrender of 1,574 shares of Flintkote which they held as pledge (Ex. 1, R. 70, fols. 208-9; R. 29)."

This premise begs the question. If there was a contract duty under the circumstances to surrender the pledge irrespective of the attachment lien, then, of course, there was a breach of contract, but if the seller was not under obligation under the circumstances to surrender the pledge, then, of course, the performance required by the contract did not include such surrender. The Courts below have held that the bailee was not under obligation to surrender the pledge.

Starting with this unsound premise, the petitioner formulates as a question of law erroneously decided by the Courts below, the following:

> "I. (A) Whether promissors (respondents here) who have served notice of readiness pursuant to the terms of the contract, and have unconditionally demanded performance by the promisee (petitioner here) have thereby made a binding representation that they are ready, willing and able to perform on their part if the promisee performs on his part?"

He then argues that the sellers, having given notice calling upon the buyer to perform, thereby made a binding representation that they would deliver the pledged collateral irrespective of the atachment lien, and as a matter of law, could not then assert the attachment lien as a ground for refusal to deliver the pledge. The argument is inconse-

quential because it assumes and is based upon a broad general proposition and question that is not presented.

The question actually presented may be formulated thus:

Where there is a contract of purchase and sale under which the seller may require the buyer to take the subject matter of the sale at a date fixed by serving notice, and the seller has received from the buyer collateral security for the performance of the buyer's obligation, does the seller, by calling upon the buyer to perform, represent and undertake that the seller will, upon the buyer's tender of the agreed purchase price, also deliver to the buyer the collateral security, despite any independent intervening lien or claim that may have attached to such collateral?

No authority whatever is cited by the petitioner upon this question. If the affirmative were the law, then if a third party, wholly disconnected with the seller, had obtained a valid attachment lien against the interest of the buyer in the collateral, the seller could not call upon the buyer to take and pay for the subject matter of the sale until such lien were satisfied, but the later lien could not be disposed of until the prior seller's lien were satisfied. In such a situation, as Judge Hand points out in his opinion, the law is that the attachment of the buyer's interest in the collateral must be attributed, not to the seller "but to the buyer, who by failing to pay gives the seller power to seize the goods by an independent title, quite as much as though the buyer had himself transferred it." To put it in other words, the contract of purchase and sale can be consummated quite independently of the disposition of the margin collateral security, which disposition is dependent upon the location at the date of closing of the right to immediate possession of the collateral. If at that time the interest of the buyer in the collateral has been transferred to a party other than the buyer, either by the act of the buyer or by process of law, such transfer of right to immediate possession of the collateral security can in no way

limit or abrogate the right of the seller to demand performance of the purchase contract by the buyer.

The second question which the petitioner claims is presented, he words as follows:

> "B. Whether the promisee (petitioner) who has duly tendered under the demand, can be put in default if the promissors (respondents) gave their notice untruly and were not in fact ready?"

This question so formulated does not arise in the case at bar, because the seller giving notice to the buyer calling upon him to buy the subject matter of the sale was ready, able and willing to deliver to the buyer the Aluminum Company stock, subject matter of the sale, and thereupon to deliver the collateral security to the person then entitled to the immediate possession thereof, to wit, the Sheriff of the County of New York; and the seller was, therefore, ready, able and willing to perform the obligations of the seller as they existed at that time.

The straw men formulated by the petitioner are beside the issue. The only question is this: Did the intervening attachment lien, whether procured by a third party or indirectly by the sellers themselves to secure an independent indebtedness, justify a refusal to deliver the pledge. On this, the real question at issue, we make the following comment:

(a) If the attachment lien against the collateral security, property of Overbury, in the possession of the defendants, was an act of an independent third party, as it legally was in law, then there can be no question whatever that the acts of the defendants were entirely justified and in order.

(b) If it be assumed that the acts of Farley were, in substance, the acts of the seller, then the issue presented in this case is, succinctly stated, whether a creditor having two independent demands against a debtor, one of which is secured by collateral, may by an independent Court

proceeding acquire for the protection of the second and unsecured indebtedness an additional subsequent lien against the collateral, which will justify the creditor in refusing to surrender the collateral notwithstanding satisfaction of the first indebtedness. On this specific subject, the petitioner has presented no case. He unquestionably fails to show that the decision herein on this point, was inconsistent with the settled law of the State of New York, which is his claimed ground for certiorari. The opinion of the Circuit Court of Appeals considers and decides this question of the right of the creditor to obtain by attachment such a second lien on property of the debtor in his possession, to secure payment of another obligation.

Point II of petitioner's brief reads as follows:

> "II. A claim in litigation is not an established debt, and defending a claim is not an act by a party to an independent contract which prevents performance or excuses non-performance of the contract by the other party."

These statements may be true, but they are not relevant to the case at bar. Petitioner apparently considers that it purports a holding that in event of an attachment of the interest of a pledgor in collateral pledged to secure a sale contract, the buyer under the contract is required to satisfy the attachment claim, however groundless it may be, or lose his rights under the contract. The case merely holds that the owner of property is not relieved from the ordinary consequences of levy of an attachment against such property by the circumstances that such property is in the custody of a bailee as security for another debt. It is true that the bailor, after he performs his contract of purchase, cannot get possession of his collateral without complying with those provisions of law applicable in all cases where an attachment is levied upon property. The petitioner was entitled to get and would have received the chattel which he had purchased upon payment of the purchase price.

With respect to his collateral he was entitled to possession thereof upon the same terms and performance respecting the attachment suit as if the pledged property were not in the custody of the bailee but had been taken directly from him. No forfeiture is involved.

Petitioner has, at page 11 of his brief, attempted to present error consisting in a failure to submit to the Jury a question of fact as to whether the plaintiff Farley acted in good faith and without knowledge that the attachment and levy under it were invalid. It is doubtful whether such an error, if there was such an issue of fact here, is ground for certiorari. Petitioner did not ask the Trial Court to submit this question to the Jury. The only specific question which he asked to submit was a question of law on undisputed facts "whether or not the attachment pleaded as a defense was procured by these defendants" (Transcript of Record, fol. 199). But even if the plaintiff had moved to submit such question of good faith to the Jury, the motion should have been denied. There was no evidence of bad faith. The defendant in the attachment suit made no claim at the time that the attachment was invalid, and had made no motion to vacate it. The original Justice who granted the writ of attachment deemed the papers sufficient, and when two years later, motion was made by the defendant in the action to vacate the attachment, the motion was denied by another Justice of the New York Supreme Court. There was not the slightest evidence of any kind that the plaintiff Farley or his attorneys considered the attachment proceedings insufficient. As a matter of fact, counsel for the respondents, despite the opinion of the Appellate Division vacating the attachment, still do consider that the papers were amply sufficient. There is no question that the plaintiff was entitled to an attachment under the laws of the State of New York on sufficient papers. He was a resident of the State of New York. The cause of action was on promissory notes. Defendant was a non-resident, and the indebtedness, as shown by the judgment, was a valid

one. Under this state of facts, the plaintiff was entitled as matter of law to an attachment under the provisions of Sections 902, paragraph 1, and 903, paragraph 1, of the New York State Civil Practice Act.

CONCLUSION

The judgment herein was in all respects correct and involved no departure from or inconsistency with authoritative precedents.

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Respectfully submitted,

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